STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CLASSIC RESIDENCES, INC.	:	DETERMINATION DTA NO. 810528
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner, Classic Residences, Inc., 551 Madison Avenue, New York, New York 10022, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On January 28, 1993 and February 4, 1993, respectively, petitioner appearing by James L. Tenzer, Esq., and the Division of Taxation appearing by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel) consented to have the controversy determined on submission without hearing. On March 16, 1993, the Division of Taxation submitted documentary evidence. On September 15, 1993, petitioner submitted a brief with attached documentary evidence. On October 19, 1993, the Division of Taxation submitted a brief with additional documentary evidence attached. On November 1, 1993, petitioner submitted a reply brief with additional documentary evidence.[1] After due consideration of the record, Timothy J. Alston, Administrative Law Judge, renders the following determination.

[1]The submission of evidence with the Division of Taxation's brief and petitioner's reply brief was not explicitly authorized by the Administrative Law Judge's letter, dated August 16, 1993, to the parties scheduling the submission of evidence and briefs. Neither party objected to such submissions, however, and the documents submitted consisted, with one exception, of gains tax filings and contracts relevant to the matters at issue. Accordingly, all documents submitted with the Division's brief and petitioner's reply brief are received into the record herein.

ISSUES

I. Whether, in a cooperative conversion, the Division of Taxation properly assessed gains tax following petitioner's 50% project update submissions on units previously transferred or whether such tax is properly payable on the sale of the remaining unsold units.

II. Whether petitioner has shown that the actual consideration received in respect of its transfer of the "commercial unit" was $14,750,000.00 and not $18,000,000.00 as reported on petitioner's gains tax filings, and if so, whether the Division of Taxation should recompute the gain determined herein accordingly.

III. Whether the Division of Taxation properly disallowed "conversion period interest" from inclusion in petitioner's original purchase price for the subject property.

IV. Whether the Division of Taxation properly disallowed "leasing commissions" from inclusion in petitioner's original purchase price for the subject property.

FINDINGS OF FACT

Petitioner, Classic Residences, Inc., formerly known as Raynes Conversions, Inc., together with Classic Properties Limited Partnership

("CPLP")[2] is the sponsor of the plan to convert 777 Madison Avenue, New York, New York ("the Property") to condominium ownership[3] and, in turn, to convert the residential condominium unit ("the Coop Property") to cooperative ownership.

On June 18, 1985, CPLP acquired an option to purchase all of the outstanding shares of stock of 970 Park Avenue, Inc. ("Inc.") which held title to the Property.

On July 24, 1985, 45 East 66th Owners Corp., a cooperative housing corporation

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[2]CPLP was formerly known as Raynes Associate Limited Partnership. CPLP is the sole shareholder of petitioner.

[3]The condominium conversion created four condominium units located on the Property: the residential condominium unit, which consisted of 33 residential apartments; the commercial condominium unit; and two professional condominium units.

("CHC"), was formed.

On March 19, 1987, the CHC submitted to the Attorney General a plan to convert the residential condominium unit, i.e., the Coop Property, to cooperative ownership.

Pursuant to an "Exchange Agreement" entered into by CPLP and the CHC and dated June 1, 1986, CPLP agreed to exchange its interest in the Coop Property for (a) the proceeds from the sale of apartment units at the Coop Property; (b) the remaining unsold units at the Coop Property; and (c) a purchase money mortgage. CPLP subsequently assigned its interest in the "Exchange Agreement" to petitioner.

In June 1987, CPLP entered into a "Purchase Agreement for Stock" to purchase all of the issued and outstanding stock of Inc. Also in June 1987, CPLP assigned its interest in the "Purchase Agreement for Stock" to

petitioner. Petitioner thus became the sole shareholder of Inc. On July 13, 1987, the "Exchange Agreement" was consummated and pursuant thereto petitioner caused Inc. to transfer the Coop Property to the CHC and then caused Inc. to liquidate. Petitioner thus became the owner of all the shares of stock in the CHC, representing the 33 cooperative apartment units at the Coop Property, along with the appurtenant proprietary leases.

On July 25, 1988, petitioner filed the Fifth Amendment to the offering plan, declaring the plan "effective". It is noted that the plan was a "non-eviction plan".

In September 1988, prior to the initial closing of the sale of apartment units, petitioner filed a Real Property Transfer Gains Tax Transferor Questionnaire for Cooperatives and Condominiums (Form DTF-701) with the Division of Taxation ("Division") reporting the anticipated transfer of apartment units at the Coop Property under "safe harbor" guidelines (discussed herein at Conclusion of Law "C"). Specifically, in its initial filing petitioner reported a total anticipated selling price of all units of $12,695,372.00. This amount included the actual anticipated gross consideration for the 15 residential apartment units under contracts of sale at the time of filing and the safe harbor gross consideration for the 18 unsold resident apartment

units. Petitioner reported total anticipated consideration under the safe harbor estimates of $10,620,052.00 and an original purchase price of $16,343,952.00, for a "gain subject to tax" of a (loss) of ($6,309,421.00).

Following its examination of petitioner's Initial Transferor Questionnaire and related filings, the Division issued to petitioner a tentative assessment and return which indicated "no tax due" for the units under contracts of sale.

Of significance herein is the fact that in its initial gains tax filings, petitioner excluded from the computation of "total anticipated consideration" any amounts for the remaining condominium units (i.e., the professional and commercial condominium units). Petitioner made reference to this exclusion in a statement attached to its initial Form DTF-700 (designated therein as Exhibit "A").

The offering plan (at page 3 thereof) states the following with respect to the sponsor's intent regarding the sale of the remaining condominium units:

> "The Sponsor presently intends to retain fee title to the Commercial Unit and the Professional Units on the Closing Date, subject to the terms and conditions of the Condominium Declaration . . . . If Sponsor elects to sell the Commercial Unit or the Professional Units, or any unit created by the subdivision or construction of the Commercial Unit or the Professional Units, Sponsor will amend the Plan to disclose the sale."

Petitioner, as seller, and Mitsui Real Estate Sales New York Co., Ltd., as purchaser, subsequently entered into an Agreement for Sale of the commercial condominium unit on November 8, 1990. Pursuant to this agreement, the selling price for the commercial unit was $18,000,000.00.

On December 5, 1990, petitioner filed its 50% project update submission (i.e., Forms DTF-700 and DTF-701). With this filing, petitioner reported a gain subject to tax as follows:

Anticipated gross consideration	$29,557,946.00
Less: Brokerage fees	(1,013,373.00)
Anticipated consideration	$28,544,573.00
Less: Original purchase price	(22,852,018.00)
Gain Subject to Tax	$ 5,692,555.00

On its project update submission, petitioner included in the calculation of "anticipated gross consideration" and "anticipated consideration" the $18,000,000.00 contract price for the

sale of the commercial condominium unit. Petitioner also included its cost of acquisition of the commercial unit in its calculation of "original purchase price".

Also on December 5, 1990, a transferee questionnaire (Form TP-581) was filed in connection with the sale of the commercial condominium unit. Said questionnaire indicated $18,000,000.00 as the consideration to be paid to the transferor by the transferee.

Petitioner's initial filing (September 1988) indicated a "method of apportionment" of "share allocation" and a "common denominator of all units" of "total shares". The December 5, 1990 project update filing indicated a "method of apportionment" of "common element percentage" and a "common denominator of all units" of "98.36% of common elements".[4]

By letter dated December 27, 1990, the Division advised petitioner of a revised anticipated gain subject to tax of $6,393,911.00. The Division's letter also advised that "as a result of this current update, additional tax is determined to be due in the amount of $332,046.54." The Division's computations, which were attached to the letter in a "Schedule of Adjustments", are set forth below:

Anticipated Gross Consideration		$29,389,536.00[5]
Less: Brokerage fees		(1,013,373.00)
Anticipated Consideration		$28,376,163.00
Less: Original Purchase Price	$22,852,018.00	
Disallowed:		
Conversion Period Interest	559,304.00	

[4]The common elements percentages allocable to the four condominium units were as follows:

Residential Unit	89.45%
Commercial Unit	8.91%
Professional Unit	0.94%
Professional Unit	0.70%
Total	100.00%

[5]The Division's adjustments, which resulted in a decrease in "anticipated gross consideration" from $29,557,946.00 as reported by petitioner to $29,389,536.00, are not in dispute herein.

Leasing Commissions	178,343.00	
"Other" Disallowances[6]	132,119.00	(21,982,252.00)
Gain Subject to Tax		$ 6,393,911.00
Tax Due to Date		$332,046.54
Tax Paid to Date		0.00
Tax Due on Units Sold		$332,046.54

On January 7, 1991, the Division issued to petitioner a Statement of Proposed Audit Changes which asserted gains tax due in the amount of $332,046.54.

In response to the Division's statement, by letter dated February 1, 1991, petitioner paid the asserted deficiency "under protest" and, along with such payment, returned to the Division its "Payment Document" (Form DTF-968) indicating disagreement with the Division's "findings".

On February 19, 1991, the Division issued to petitioner a Notice of Determination which formally assessed real property gains tax against petitioner in the amount of $332,046.54. Petitioner protested said notice by timely filing a Request for Conciliation Conference. Following such conference, a Conciliation Order dated November 22, 1991 was issued sustaining the assessment. The Conciliation Order also noted that

petitioner's payment of $332,046.54 had been applied to the asserted liability.

By an agreement dated May 10, 1991, petitioner, as seller, and Mitsui Real Estate Sales of New York Co., Ltd. amended their Agreement of Sale of the condominium unit to provide for an adjustment in the purchase price from $18,000,000.00 to $14,750,000.00.

Petitioner introduced into the record an affidavit of

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[6] Such "Other" disallowances are not at issue herein.

Jay D. Solinsky, senior vice-president of petitioner, dated September 14, 1993 which stated, in part:

"6) From inception, it was [petitioner's] intention to retain the commercial and professional condominium units (the 'Units') as an investment for both i) current cash flow, to assist in achieving its cash flow requirements and ii) for future appreciation. To that end, [petitioner] did not:

a) Offer the Units for sale,

b) List the Units for sale with a real estate agent, real estate broker or other sales agent or agency,

c) Advertise the Units for sale, or

d) Solicit offers, in any way, from prospective purchasers.

"7) In 1990 [petitioner] received an unsolicited inquiry and offer to purchase the commercial condominium unit (the 'Unit'). Although . . . its intention was to retain the Unit, due to the difficult economic environment, the increasing cash flow drain of the unsold residential units at the Property and at the other properties owned by [petitioner], and the extreme financial difficulties experienced by the entity that was its primary source of required funding, management decided that it was prudent to consider the offer.

"8) Extensive negotiations culminated in the November 8, 1990 'Agreement of Sale' (the 'Agreement') between [petitioner], as seller, and Mitsui Real Estate Sales New York Co., Ltd., as purchaser for a purchase price of $18,000,000.

"9) On May 10, 1991, after extensive negotiations, the Agreement was amended to reduce the purchase price to $14,750,000.

"10) On June 19, 1991 title to the Unit was transferred to the purchaser."

Petitioner introduced no closing documents showing that the commercial unit was transferred for a purchase price of $14,750,000.00.

As noted previously, petitioner claimed, and the Division disallowed, as part of its original purchase price for the subject property $559,304.00 in conversion period interest.

Petitioner conceded that the $559,304.00 amount did not include amounts of interest incurred on funds borrowed to acquire the Property or to improve the Property.

Petitioner stated that such conversion period interest expense was incurred in connection with "amounts borrowed to fund the costs to convert the Coop Property." Petitioner presented no evidence as to what specific costs of conversion necessitated such borrowing.

Petitioner established by documentary evidence that it did incur interest expense of

$559,248.00.

As also noted previously, petitioner claimed, and the Division disallowed, as part of its original purchase price for the subject property leasing commissions in the amount of $178,343.00. Such commissions were paid in connection with the acquisition of tenant leases for space in the commercial condominium unit.

Attached to the Agreement of Sale dated November 8, 1990 entered into the record herein was a listing of the commercial leases then in effect for the commercial unit. The list indicates that five such leases were in effect at the time the agreement was entered into. The leases bore dates ranging from August 14, 1986 to January 16, 1990 and, based on the lease expiration dates which were also listed, each of the leases had a term of approximately 10 years.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax on gains derived from the transfer of real property within New York State. With respect to cooperative conversions, the gains tax is imposed upon the overall conversion plan. In other words, for purposes of computing the tax, a cooperative conversion is treated as a single transfer (see, Tax Law § 1442[b]; Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316; 1230 Park Assoc. v. Commr. of Taxation and Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455).

B. Payment of gains tax is due upon the transfer of shares to individual purchasers pursuant to a cooperative plan (Tax Law § 1442[b]; 20 NYCRR 590.35[a]). In computing the amount of tax due as each share is sold, an apportionment of the original purchase price of the real property and total consideration anticipated under such cooperative plan shall be made for each share (Tax Law § 1442[b]).

C. On May 1, 1986, the Division issued certain standards, called the "Safe Harbor Estimates", to be followed by taxpayers to estimate consideration to be received pursuant to cooperative and condominium conversion plans (see, "Safe Harbor Estimates for Transfers Pursuant to Condominium and Cooperative Plans", TSB-M-86-[3]-R). Such standards represent a modification of pre-1986 Division guidelines in computing gain subject to tax for

condominiums and cooperative conversions called "Option B" (see, TSB-M-83-[2]-R). Hence, the 1986 standards are also referred to as "modified Option B" and "new Option B".

Under modified Option B (as under the prior Option B), total consideration anticipated and total original purchase price were apportioned to each unit sold and, based upon these apportioned amounts, an apportionment of total anticipated gain for each unit sold was calculated. The Division's "Safe Harbor Estimates" provided guidelines for determining anticipated total consideration and anticipated gain. Where a taxpayer uses the appropriate safe harbor estimates of anticipated consideration on unsold units, that transferor will be treated as if he had estimated consideration at the exact amount that is actually received on these units when sold. Accordingly, where the safe harbor estimates are lower than the actual selling price (resulting in an underpayment of tax), no penalty or interest will be imposed on such underpayments (see, TSB-M-86-[3]-R). The taxpayer is thus able to postpone the full amount of tax owed based on actual consideration. Under such circumstances, the tax per unit or per share will be increased for the remaining unsold shares when recalculated at the 50% and 75% plateaus and tax may be due at the 100% sell-out point.

Where the safe harbor estimates are greater than the actual selling price, the tax per unit or per share will be reduced for the remaining unsold shares when recalculated at the 50% and 75% plateaus. Under such circumstances, a refund may be due at the 100% sell-out point.

As noted, where safe harbor estimates are properly used, no penalty or interest shall accrue during the sell-out period. Penalty and interest may accrue during such sell-out period, however, where overstatement of original purchase price or understatement of any other component of consideration under the plan results in underpayment of tax (TSB-M-86-[3]-R).

D. Petitioner contended that the Division improperly assessed gains tax herein following petitioner's 50% project update filing. Petitioner contends that it properly followed safe harbor guidelines as set forth in TSB-M-86-(3)-R and that, therefore, any gains tax determined by the Division following its examination of petitioner's 50% project update filing is properly payable upon the sale and transfer of the remaining unsold units.

Petitioner's contention is rejected, for, contrary to its assertion, petitioner did not comply with the safe harbor guidelines. In its initial gains tax filings in connection with the subject property, petitioner did not include the commercial unit in its calculation of anticipated gross consideration. In its 50% project update filings, petitioner did include the $18,000,000.00 commercial unit in its calculation of anticipated gross consideration. This increase in anticipated gross consideration did not result from changing real estate values of the units offered for sale under the plan. Rather, this increase resulted from an amendment to the plan which added the commercial unit to the units offered for sale.

While Option B obviously expects changes in total anticipated consideration during the sell-out period, Option B clearly anticipates that such changes will result from fluctuations in the real estate market and not from an increase in the number of units offered for sale.[7] An increase in the number of units will necessarily increase the common denominator used in apportioning the anticipated tax due and will, therefore, render invalid the apportionment used prior to the increase. Such an increase in the common denominator runs contrary to the safe harbor guidelines which refer to a "fixed common denominator" (see, "Instructions for Forms DTF-701 and DTF-702 Real Property Transfer Gains Tax Questionnaires for Cooperatives and Condominiums", Form DTF-701-I). Here, by adding the commercial unit to the units to be offered for sale under the plan, petitioner failed to comply with the safe harbor guidelines and, therefore, lost the protections afforded by such guidelines. Accordingly, the Division properly assessed gains tax herein at the time of petitioner's 50% project update filing.

It is significant that the increase in the number of units caused by the addition of the commercial unit to the units offered for sale necessitated a change in petitioner's method of apportionment from shares of stock to a percentage of common elements method. This change also is explicitly contrary to the safe harbor guidelines which provide that "the method of

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[7]Indeed, the purpose of the 50% and 75% project update filings is to adjust previous estimates based on actual sales.

apportionment utilized shall be irrevocable for all units sold under the plan" (see, Form DTF-701-I).

E. That the addition of the commercial unit to the units to be sold under the plan necessitates the removal of safe harbor protections for petitioner also may be seen in the windfall to petitioner which would result if petitioner were allowed safe harbor protection herein. As a result of the exclusion of the commercial unit from the initial gains tax filings, petitioner was able to report an anticipated loss and avoid any payment of tax prior to the 50% update submission. The inclusion of the commercial unit at the 50% update under safe harbor protections would allow petitioner to report gain and pay all tax on future unit sales rather than by an apportionment on each sale (Tax Law § 1442) notwithstanding the addition of the commercial unit to the units offered for sale.

F. It is noted that petitioner contended that it did not intend to offer the commercial unit for sale at the time of the initial gains tax filings. The evidence presented on this point fails to establish this contention. The issue of intent, however, is irrelevant to the issue of whether petitioner complied with the safe harbor guidelines. There is simply no provision either in the law or the relevant TSB-M's which make intent a factor in determining whether the guidelines were followed.

G. Petitioner's reliance on Matter of Belvedere Garden Associates (Tax Appeals Tribunal, June 18, 1992) is misplaced. In that case, the Tribunal directed that a refund of an erroneous gains tax payment be granted where the petitioner had complied with all Option B guidelines. The Tribunal emphasized, however, that its rationale in Belvedere Garden Associates did not extend to situations where the transferor failed to comply with the Option B guidelines. Since petitioner herein was not in compliance with the safe harbor guidelines, Belvedere Garden Associates is unsupportive of petitioner's position.

H. Petitioner also contended that, notwithstanding any other issues herein, the Division, in its calculation of additional gains tax due, improperly used $18,000,000.00 as the gross consideration for the commercial unit. Petitioner contended that the actual gross consideration

received in respect of the commercial unit transfer was $14,750,000.00 and that the safe harbor guidelines require that the Division use this $14,750,000.00 amount as the gross consideration for the commercial unit. Petitioner thus contended that the gain per unit be recomputed using the $14,750,000.00 figure.

Petitioner has clearly failed to establish the actual consideration received in respect of the commercial unit transfer. Accordingly, petitioner's contention that the gain per unit be recomputed using $14,750,000.00 as the consideration for the commercial unit is rejected.[8]

The evidence presented to establish the $14,750,000.00 selling price for the commercial unit consists of the letter agreement dated May 10, 1991 and an affidavit from Jay D. Solinsky (see, Finding of Fact "22"), senior vice-president of petitioner. In contrast, petitioner's own 50% project update submissions, the transferee questionnaire and the November 8, 1990 Agreement of Sale all indicate $18,000,000.00 consideration. Notably absent from the record are any closing documents indicating a $14,750,000.00 selling price or any evidence providing a reason for the renegotiated selling price (i.e., an explanation for the decrease of $3,250,000.00 in the value of the property in the six months between the original agreement of November 8, 1990 and the agreement dated May 10, 1991). Further, petitioner did not file or seek to file 50% project update submissions (or resubmissions) with the $14,750,000.00 consideration amount. It is thus concluded that petitioner has not proved the $14,750,000.00 figure constituted the actual consideration paid for the commercial unit. Accordingly, petitioner's contention that the gain per unit be recomputed using the $14,750,000.00 figure is rejected.

It is noted that petitioner, in its brief, objected to the use of the $18,000,000.00

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[8]It is noted that, in their briefs, neither party addressed the issue of whether petitioner had substantiated its claim that the actual consideration for the commercial unit was $14,750,000.00. In its petition, petitioner alleged, apparently for the first time, that the gross consideration for the commercial unit was $14,750,000.00. In its answer, the Division denied knowledge or information sufficient to form a belief as to this allegation. Accordingly, this issue was in dispute and is properly addressed herein.

consideration amount in the Division's Statement of Proposed Audit Changes dated January 7, 1991. The agreement which amended the commercial unit consideration from $18,000,000.00 to $14,750,000.00, however, is dated May 10, 1991, or some four months after the issuance of the Statement of Proposed Audit Changes. What did exist as of January 7, 1991 were the 50% project update submissions and the November 8, 1990 Agreement of Sale, both of which indicated an $18,000,000.00 selling price. Indeed, it appears from the record that the $14,750,000.00 figure was first raised in the petition dated February 19, 1992. Under such circumstances, petitioner's objection to the Division's use of the $18,000,000.00 amount herein seems disingenuous.

I. It is further noted that even if petitioner had established that the actual consideration for the commercial unit was $14,750,000.00, it would nonetheless be improper, under the instant circumstances, to direct the Division to recompute the gain herein. Under the facts as asserted by petitioner, it would appear that petitioner filed its 50% project update prematurely. Petitioner should have filed a supplemental or amended update at the time of the asserted transfer of the commercial unit. Petitioner, however, has made no gains tax filings in respect of the commercial unit transfer which indicate a $14,750,000.00 consideration amount. All gains tax forms filed with the Division related to the commercial unit transfer reflect the $18,000,000.00 consideration amount. In the absence of such filings, any recomputation by the Division would be improper.[9]

J. Tax Law § 1440(5)(a) defines "original purchase price" as follows:

> "[T]he consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the tax commission, incurred for the construction of such improvements. Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property and those customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative or

[9]It should be noted that petitioner will have an opportunity to remedy its situation, if appropriate, upon the filing of its 75% project update submissions.

condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission." (Emphasis supplied.)

K. Pursuant to the authority delegated to the Commissioner of Taxation and Finance by Tax Law § 1440(5)(a), the Division has promulgated a regulation (20 NYCRR 590.39) illustrating those "customary, reasonable and necessary" costs of converting property to cooperative or condominium ownership if paid or required to be paid by the realty transferor. Said regulation, 20 NYCRR 590.39, states as follows:

"Question: What are the allowable costs of co-oping (or converting property to condominium form) if paid or required to be paid by realty transferor?

"Answer: The following list illustrates costs that are includible in original purchase price as costs to convert property to cooperative or condominium form:

- legal, accounting and engineering fees incurred directly as a result of cooperative or condominium formation and transfer of title to the cooperative corporation
- filing and recording fees

- costs of printing offering plan
- title insurance
- New York City Real Property Transfer tax paid as a result of conveyance of title to the cooperative corporation
- New York State Real Estate Transfer Tax paid as a result of conveyance to the cooperative corporation
- appraisal fees
- mortgage recording tax on mortgages created as a result of conveyance of title to the cooperative corporation
- mortgage commitment fees
- points paid to lender
- the cost of 'buying down' the interest rate on co-op loans to purchasers
- the cost of 'buying out' nonpurchasing tenants
- amounts paid to relocate nonpurchasing tenants"

L. As noted previously, petitioner claimed $559,304.00 in "conversion period interest" as includible in its original purchase price and the Division disallowed this claimed amount. Petitioner defines "conversion period interest" largely by what it is not. Conversion period interest does not include "interest incurred on funds borrowed to acquire the Property or to improve the Property" (Pet. brief, p. 11). Conversion period interest is "the interest relating to that portion of amounts borrowed to fund the costs to convert the Coop Property" (id.). Petitioner did not further specify or describe the costs of conversion which gave rise to its claimed conversion period interest expense.

M. The statute (Tax Law § 1440[5][a]) limits costs includible in original purchase price to those which are "customary, reasonable and necessary." In order to determine whether any given cost is "customary, reasonable and necessary", it is necessary to describe or explain those costs with some degree of specificity. This petitioner has failed to do. Indeed, petitioner appears to have avoided any specific explanation of the conversion costs giving rise to the claimed conversion period interest expense. In the absence of any evidence in the record specifically describing the costs which relate to the conversion period interest expense, it is clear that petitioner has failed to prove that the claimed conversion period interest expense was "customary, reasonable and necessary." Accordingly, the Division's disallowance of such expenses is sustained.

N. It is noted that the record does show that petitioner did incur an interest expense of $559,248.00. "Original purchase price", however, does not include all amounts expended in the process of converting real property to cooperative or condominium ownership (see, Matter of 1230 Park Assoc. v. Commr. of Taxation and Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455; Matter of Mattone v. Dept. of Taxation & Fin., 144 AD2d 150, 534 NYS2d 478). Petitioner was therefore required to prove not only that it incurred the interest expense but also that the expense was "customary, reasonable and necessary." As discussed previously, petitioner has failed to meet its burden with respect to the latter.

O. Petitioner also contended that $178,343.00 in leasing commission costs incurred in connection with the acquisition of tenant leases for space in the commercial condominium unit were properly includible in original purchase price. Petitioner argued that such costs are includible in original purchase price as "other acquisition costs" of the Property since such commissions represent the cost to acquire the tenant leases which are also interests in real property under Article 31-B.

This argument is rejected, for the tenant leases are unrelated to petitioner's acquisition of the subject property. Moreover, contrary to petitioner's argument, the leases in question are not "transfers of real property" under Article 31-B since each has a term of approximately 10 years

(see, Finding of Fact "29"; Tax Law § 1440[7]). Further, notwithstanding the foregoing, it should be noted that by acquiring tenant leases petitioner did not acquire an interest in the subject real property but rather gave up an interest, i.e., the leasehold, to the tenant.

P. Petitioner also contended that the leasing commissions were properly includible in original purchase price as "allowable selling expenses" (see, Form DTF-701) because the leases ultimately gave the commercial unit the value that ultimately resulted in the favorable selling price for that unit. Petitioner likened the cost of leasing commissions to obtain commercial tenants to the cost of tenant improvements to the property since both types of costs increase the value of the property.

This contention is also rejected. The Division's regulations with respect to allowable selling expenses provide, in part:

"Question: What selling expenses may be included in original purchase price?

* * *

> "Expenditures which involve doing something to the real property itself so as to make it easier to sell or to obtain a desired price may not be included in original purchase price unless the costs were incurred to construct a capital improvement" (20 NYCRR 590.17).

Clearly, the leasing commissions fall into the category of expenditures designed to make property easier to sell or to obtain a desired price. Accordingly, the Division properly excluded the leasing commissions from petitioner's original purchase price.

Q. The petition of Classic Residences, Inc. is denied and the Notice of Determination dated February 19, 1991 is sustained.

DATED: Troy, New York
April 28, 1994

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE